Great Lakes Chemical Corporation *and* Oil, Chemical and Atomic Workers International Union, AFL–CIO, Local 3-724. Case 10–CA–24463

December 28, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

On December 28, 1989, the General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain and by unilaterally laying off employees without notification to and bargaining with the Union. The Respondent filed its answer admitting in part and denying in part the allegations in the complaint.

On June 28, 1990, the General Counsel filed a Motion for Summary Judgment. On June 29, 1990, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain and its unilateral layoff of five employees, but denies it engaged in any unlawful conduct. Specifically, the Respondent denies: (1) that the unit specified in the complaint constitutes a unit appropriate for collective bargaining; (2) that it is a successor employer to Syntex Chemicals, Inc., as found in *Great Lakes Chemical Corp*., 298 NLRB 615 (1990) (*Great Lakes I*); (3) that Syntex maintained a facility in Newport, Tennessee, until about June 1, 1984, where it was engaged in the production of chemical products; (4) that on June 1, 1984, the Respondent assumed the chemical production facility previously operated by Syntex and began performing operations previously performed by Syntex, using equipment formerly used by Syntex, engaging in substantially the same business of operating a chemical production facility, and employing substantially the same supervisors as formerly employed by Syntex; (5) that the former Syntex employees, who the Respondent admits compose a majority of the Respondent's employees, compose that majority in a unit appropriate for collective bargaining; and (6) that the Union has been, and is, the representative of a majority of the employees in the appropriate collective-bargaining unit for purposes of collective bargaining and is their exclusive representative pursuant to Section 9(a) of the Act.[1]

In the Motion for Summary Judgment, the General Counsel submits that the Respondent has conceded its refusal to bargain and unilateral layoff of five employees on October 6, 7, and 8, 1989, and that the Respondent's defense essentially arises from its denial of a duty to bargain with the Union. This defense, the General Counsel contends, has been previously raised and rejected in the Board's prior decision in *Great Lakes I*, involving the same parties. *Great Lakes I* made specific factual findings that, according to the General Counsel, collaterally estop the Respondent from asserting any contrary facts here and provide a complete basis for the Board to resolve the 8(a)(5) and (1) issues, so that there are no genuine issues of material fact requiring an evidentiary hearing before an administrative law judge. We agree.

Great Lakes I involved allegations of 8(a)(1), (3), (4), and (5) violations by the Respondent. The Board adopted the administrative law judge's findings, inter alia, that the Respondent, as a joint employer with C & N General Services, Inc., violated Section 8(a)(5) by refusing to bargain with the Union as a successor to Arapahoe Chemicals, a division of Syntex Chemicals, Inc., as of April 26, 1985.

With respect to the General Counsel's motion, a review of the complaint allegations, the Respondent's answer, and the Board's prior decision in *Great Lakes I* reveal that that decision made factual findings that address and contradict each of the points the Respondent's answer attempts to place at issue. Specifically, contrary to the Respondent's denials concerning Syntex, the Board has found that: (1) Syntex owned and operated the Newport, Tennessee plant before the Respondent purchased it in June 1984; (2) the Respondent used the same plant and equipment and employed the same supervisors and employees as Syntex; (3) the Union achieved majority status based on the number of former Syntex employees it hired by April 26, 1985, at which time the Respondent employed a representative complement of employees and the plant was fully operational; and (4) there were no differences in the Respondent's and Syntex's chemical production that were significant enough to affect the employees' representational desires. Finally, contrary to the Respondent's present denials of allegations relating to the unit and its obligation to bargain, the Board

[1] The complaint alleges that about February 11, 1985, and thereafter, the Union requested the Respondent to bargain collectively with the Union as the exclusive bargaining representative of all employees in the appropriate bargaining unit, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and that the Respondent refused on February 19, 1985, and thereafter. In its answer, the Respondent admits that the Union ''demanded recognition of certain employees at its Newport, Tennessee facility'' on February 11 and December 9, 1985, and that it ''declined the Union's demand for recognition'' about February 19, 1985, and February 3, 1986, and denies these allegations in all other respects.

in *Great Lakes I* adopted the judge's findings that after Syntex purchased the Newport plant in 1974—and indeed before the purchase—successive collective-bargaining agreements, including the latest one dated April 4, 1983, to April 4, 1986, have covered employees in the following unit:

> All production and maintenance employees, laboratory technicians, environmental technicians and instrument technicians employed by the Employer at its Newport, Tennessee facility, but excluding all office clerical employees, professional employees, technical employees including development technicians, guards and supervisors as defined in the Act.[2]

These controlling findings establish beyond dispute in the instant case that the Respondent violated Section 8(a)(5) and (1) by refusing to bargain with the Union. The Board's findings in *Great Lakes I*—in conjunction with the Respondent's admissions that it unilaterally laid off employees Tommy McGaha and Gary Watts on October 6, employees Larry Rines and Eugene Lawson on October 7, and employee Bartley Thornton on October 8, 1989, without notification to and bargaining with the Union—also establish that the Respondent violated Section 8(a)(1) and (5) by failing to bargain with the Union about these layoffs and their effects on employees in the above-described unit. Because the factual findings in *Great Lakes I* were fully and fairly litigated and necessarily decided in that decision, the Respondent is collaterally estopped from relitigating the facts supporting these allegations of the complaint in the instant proceeding.[3] We therefore find that the Respondent has not raised any issue that is properly litigable in this unfair labor practice proceeding.[4] Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Delaware corporation, is engaged in the manufacture of chemical products at its facility in Newport, Tennessee, where it annually sells and ships finished products valued in excess of $50,000 directly to customers located outside the State of Tennessee. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Syntex maintained a facility at Newport, Tennessee, where it was engaged in the production of chemical products until June 1, 1984. At that time the Respondent assumed the chemical production facility and began operations at the premises formerly occupied by Syntex, using equipment formerly used by Syntex, and engaging in substantially the same business of operating a chemical production facility. The Respondent employs substantially the same supervisors as were formerly employed by Syntex and employs a majority of former Syntex employees in the following appropriate unit:

> All production and maintenance employees, laboratory technicians, environmental technicians and instrument technicians employed by the Respondent at its Newport, Tennessee facility, but excluding all office clerical employees, professional employees, technical employees, including development technicians, guards and supervisors as defined in the Act.

We find that the Respondent is a successor employer to Syntex. *Great Lakes Chemical Corp*., 298 NLRB 615 (1990).

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[2] This unit finding, contained in the body of the judge's decision, which the Board adopted in *Great Lakes I*, is more detailed than the unit description set forth in the judge's recommended Order and notice, also adopted in that decision. The latter unit description does not specifically refer to laboratory, environmental, and instrument technicians, but includes these job classifications comprehensively as ''all production, maintenance, and laboratory employees'' and does not specify that development technicians are within the exclusion provided for technical employees. In the instant proceeding, the Respondent is estopped to deny the detailed unit finding contained in *Great Lakes I* and, in any event, does not dispute the composition of the unit alleged in the complaint in terms of its inclusion or exclusion of specific job classifications.

[3] In general, a factual finding that was necessary to support the judgment in a prior proceeding will bar relitigation on that issue in a subsequent proceeding involving the same parties. See *Montana v. U.S.*, 440 U.S. 147, 153 (1979); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 and fn. 5 (1979); *Sabine Towing & Transportation Co*., 263 NLRB 114, 120–122 (1982); *Bethlehem Steel Corp*., 283 NLRB 254, 255 fn. 2 (1987); cf. *T & W Fashions*, 291 NLRB 137, 139 fn. 1 (1988).

[4] In *Great Lakes I*, the Board found that the Respondent and C & N General Services, Inc. (C & N), which furnished ''temporary'' employees to the Respondent, were joint employers, and the Board included the C & N employees in the appropriate unit. In the instant case, the Respondent argues that it is entitled to a hearing in order to present evidence that it contends will show that the *Great Lakes I* joint employer and unit findings are no longer appropriate. Specifically, the Respondent contends that ''[s]ince the fall of 1989,'' the Respondent has replaced C & N with a different temporary employee source, S & W Security & General Services, Inc. (S & W), which resulted from the merger of C & N with another company.

In the ''fall of 1989,'' *Great Lakes I* was pending before the Board, but the Respondent did not bring to the Board's attention the evidence it now claims bears on the joint employer and unit issues. Accordingly, to the extent the Respondent is attempting to litigate here matters that should have been raised in *Great Lakes I*, its request for a hearing is untimely. See *NLRB v. Atlas Microfilming*, 753 F.2d 313, 319–320 (3d Cir. 1985).

Furthermore, the question of whether ''temporary'' employees furnished by another employer are part of the appropriate unit is not central to the resolution of this case. The unlawful refusal to bargain with the Union occurred years before the alleged changed circumstances. In addition, the Respondent has not claimed that the laid-off employees were ''temporary'' employees supplied by S & W. On the contrary, the Respondent admits the complaint allegations that it unilaterally laid off five of ''its . . . employees.'' Accordingly, we find that the matter the Respondent raises is suitable for resolution at the compliance stage of this proceeding, and the Respondent may present its evidence at that time.

Since about September 17, 1970, successive collective-bargaining agreements, including an agreement effective from April 4, 1983, to April 3, 1986, have covered the employees in the unit set forth above. At all material times, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of all employees in that unit for the purpose of collective bargaining.

About February 11, 1985, and at times thereafter, including about December 9, 1985, the Union has requested the Respondent to bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment of unit employees. Since April 26, 1985, and at all times thereafter, the Respondent has refused the Union's requests.

On October 6, 1989, the Respondent unilaterally laid off employees Tommy McGaha and Gary Watts; on October 7, 1989, employees Larry Rines and Eugene Lawson; and on October 8, 1989, employee Bartley Thornton, without notification to and bargaining with the Union. We find that these refusals to bargain and unilateral layoffs constitute unlawful refusals to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing to bargain with the Union as the exclusive collective-bargaining representative of unit employees and by laying off employees without bargaining with the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent refused to bargain with the Union, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement. Having found that the Respondent failed to bargain over the October 6, 7, and 8 layoffs, we shall order the Respondent to bargain with the Union concerning those layoff decisions and the effects of those decisions. The Respondent shall reinstate employees McGaha, Watts, Rines, Lawson, and Thornton, and make them whole for any loss of earnings and benefits resulting from their unlawful layoffs. *Adair Standish Corp.*, 292 NLRB 890 (1989), enfd. mem. in pertinent part 914 F.2d 255 (6th Cir. 1990). Backpay shall be based on the earnings that the employees normally would have received during the applicable period, less any net interim earnings, and shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Great Lakes Chemical Corporation, Newport, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Oil, Chemical and Atomic Workers International Union, AFL–CIO, Local 3-724, as the exclusive bargaining representative of employees in the following appropriate unit:

> All production and maintenance employees, laboratory technicians, environmental technicians and instrument technicians employed by the Respondent at its Newport, Tennessee facility, but excluding all office clerical employees, professional employees, technical employees, including development technicians, guards and supervisors as defined in the Act.

(b) Unilaterally laying off employees without providing the Union with notice and an opportunity to bargain about the decisions to lay off employees and the effects of those decisions.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the above-described unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement.

(b) On request, bargain with the Union concerning the decisions to lay off employees on October 6, 7, and 8, 1989, and the effects of those decisions.

(c) Offer those employees laid off on October 6, 7, and 8, 1989, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of those layoffs, in the manner set forth in the remedy section of this decision.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facility in Newport, Tennessee, copies of the attached notice marked ''Appendix.''[5] Copies of

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Rela-

the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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tions Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Oil, Chemical and Atomic Workers International Union, AFL–CIO, Local 3-724 as the exclusive representative of the employees in the following bargaining unit:

> All production and maintenance employees, laboratory technicians, environmental technicians and instrument technicians employed by us at our Newport, Tennessee facility, but excluding all office clerical employees, professional employees, technical employees, including development technicians, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally lay off employees without providing the Union with notice and an opportunity to bargain about the decisions to lay off employees and the effects of those decisions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the above-described unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and WE WILL put in writing and sign any agreement reached.

WE WILL, on request, bargain with the Union concerning the decisions to lay off employees on October 6, 7, and 8, 1989, and the effects of those decisions.

WE WILL offer those employees laid off on October 6, 7, and 8, 1989, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and make them whole for any loss of earnings and other benefits suffered as a result of those layoffs, in the manner set forth in the remedy section of the Board's decision.

GREAT LAKES CHEMICAL CORPORATION